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IVERSON, M.D., STEVEN A. STANTEN, M.D., and

9 WILLIAM M. ISENBERG, M.D., Ph.D.

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12
13 COYNESS L. ENNIX, JR., M.D., as an
14 individual and in his representative capacity
under Business & Professions Code Section
17200 et seq.,

15 Plaintiff,

16 v.

17 RUSSELL D. STANTEN, M.D., LEIGH I.G.
18 IVERSON, M.D., STEVEN A. STANTEN,
M.D., WILLIAM M. ISENBERG, M.D.,
19 Ph.D., ALTA BATES SUMMIT MEDICAL
CENTER and does 1 through 100,

20 Defendants.
21

CASE NO. C 07-2486 WHA

**DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S
MOTION TO ALTER BRIEFING
AND HEARING DATES**

DEPT: Courtroom 9, 19th Floor

JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007

TRIAL DATE: No date set.

1 **I. INTRODUCTION**

2 The request of Coyness L. Ennix, Jr., M.D. ("Plaintiff" or "Dr. Ennix") to
 3 postpone the July 5, 2007 hearing date of Defendants' pending motions, while he
 4 maintains surgical privileges at ABSMC, wholly ignores the impact of such a delay on the
 5 Medical Center's peer review process and, by extension, on its patients. As explained in
 6 the Declaration of Dr. R. Stanten,¹ this lawsuit has significantly impaired peer review,
 7 both with respect to the review of Dr. Ennix's past and prospective patient care, as well
 8 as with respect to the recruiting of peer reviewers generally. Because of these concerns,
 9 Defendants have worked diligently to ensure that their motions, and in particular their
 10 anti-SLAPP motion, are heard in a timely manner. Indeed, Defendants filed their
 11 motions shortly after Dr. Ennix filed this lawsuit. Having worked so hard to have these
 12 issues adjudicated promptly, the Court should not delay the hearing simply because one
 13 of Dr. Ennix's attorneys has two scheduled vacations within a less than two month
 14 period. Had Plaintiff remained in state court and not forum shopped his way into federal
 15 court, a prompt hearing on the anti-SLAPP motion would have been required. Given the
 16 competing interests here, it can hardly be argued that one lawyer's multiple vacations
 17 should outweigh the public's interest in the conduct of peer review. Indeed, opposing
 18 counsel has at no time suggested that Dr. Ennix cease performing surgeries for the
 19 extended period requested by his counsel.

20 **II. ARGUMENT**

21 **A. Dr. Ennix's Request Is Contrary To The Very Purpose Of The Anti-**
 22 **SLAPP Statute.**

23 Pursuant to CCP 425.16(f), an anti-SLAPP motion "shall be scheduled by
 24 the clerk of the court for a hearing not more than 30 days after the service of the motion
 25 unless the docket conditions of the court require a later hearing." Similarly, CCP
 26 425.16(g) provides that "[a]ll discovery proceedings in the action shall be stayed upon

27 ¹ Filed (partially under seal) in conjunction with Defendants' pending anti-SLAPP motion. The
 28 anti-SLAPP motion is currently set for hearing on July 7, 2007 together with Defendants' motion
 to dismiss.

1 the filing of a notice of motion made pursuant to this section. The stay of discovery shall
 2 remain in effect until notice of entry of the order ruling on the motion.” These provisions
 3 are “designed to enable the defendant-victim of a SLAPP suit to extract himself or
 4 herself from the lawsuit as quickly and inexpensively as possible.” *S. B. Beach*
 5 *Properties v. Berti*, 39 Cal. 4th 374, 382 (2006). As recognized by the California
 6 Supreme Court, any unnecessary delay suffered by a SLAPP “victim” is too much. Here,
 7 contrary to the foregoing, Plaintiff’s proposed hearing date would require that
 8 Defendants expend additional attorneys’ fees in preparing their initial disclosures and in
 9 preparing for the Court’s Case Management Conference. The delay also, as discussed
 10 below, will continue to harm ABSMC’s peer review process.

11 Defendants’ motion was properly set in light of the competing interests
 12 between Code of Civil Procedure § 425.16(f), Local Rule 7-2 and this Court’s docket
 13 requirement that civil law and motion be heard on Thursday mornings. Section 425.16(f)
 14 required Defendants to set the hearing date within 30 days of the filing date. Local Rule
 15 7-2, however, requires the filing party to provide at least 35 days notice to the opposing
 16 party when filing a motion. In addition, this Court only hears civil law and motion on
 17 Thursday mornings. Thus, the only possible date Defendants could have noticed the
 18 hearing for was July 5th or 36 days after the May 30th filing date (the 35th day, July 4th,
 19 was a federal holiday). See *Ryan v. Editions Ltd. W., Inc.*, 2006 U.S. Dist. LEXIS 93670,
 20 *4-*5 (N.D. Cal. 2006) (holding that an anti-SLAPP motion which set the hearing date 35
 21 days from the date of filing in accordance with N.D. L-R 7-2, rather than the 30 days
 22 required by CCP § 425.16(f), was proper because the Civil Local Rules are docket
 23 conditions that justify a later hearing). Given the operative statute’s fundamental
 24 purpose, nothing suggests that anti-SLAPP motions should be noticed for periods in
 25 excess of 35 days. See *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1102 (C.D.
 26 Cal. 2004) (acknowledging that “the very objective of the [anti-SLAPP] procedure is to
 27 permit early resolution of claims”). Opposing counsel’s vacation schedule does not
 28 constitute a “docket condition” warranting departure from the statutory scheme.

1 **B. Any Postponement Of The July 5 Hearing Date Will Harm**
 2 **Unnecessarily The Peer Review Process At ABSMC And, By**
 3 **Extension, The Medical Center's Patients.**

4 Peer review not only serves the hospital's interest, but it also serves an
 5 important public interest: "Hospital peer review, in the words of the Legislature, 'is
 6 essential to preserving the highest standards of medical practice' throughout California."
 7 *Kibler v. Northern Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192, 199 (2006). Because
 8 of the importance of peer review, in addition to the time and expenses unfairly imposed
 9 upon all defendants victimized by a SLAPP lawsuit, here the Defendants are suffering an
 10 unusual and particularly compelling additional harm, which has at least three facets.

11 First, because Dr. Ennix continues to operate at ABSMC, the proposed
 12 delay will continue to impede the Medical Center's ability to evaluate the care Dr. Ennix
 13 provides to patients. As detailed in Dr. R. Stanten's Declaration, this lawsuit, and
 14 Plaintiff's conduct since filing this lawsuit, has impaired the Medical Center's ability to
 15 evaluate Dr. Ennix on an ongoing basis. This will continue at least until Defendants'
 16 motions are resolved. Second, and for similar reasons, the Medical Center will continue
 17 to have difficulty evaluating Dr. Ennix's past surgeries. Third, this lawsuit has had a
 18 chilling effect on the Medical Center's ability to recruit physicians to perform peer review
 19 functions, a process that depends wholly on doctors cooperating in the improvement of
 20 their patient care practices.

21 In sum, Defendants are experiencing a type of harm that significantly
 22 outweighs any need for delay. There is no reason why Dr. Ennix should be allowed to
 23 file a lawsuit causing immediate and ongoing harm to the public's interests in obtaining
 24 competent health care, and then deny Defendants the ability to seek relief at the earliest
 25 opportunity provided by law because one of his attorneys has scheduled a series of
 26 vacations. Defendants didn't pick the timing of this litigation—Dr. Ennix did.

1 **C. Defendants Have At All Times Acted To Expedite The Hearing Of Its**
2 **Pending Motions.**

3 Plaintiff filed his complaint in state court on April 3, 2007 and Defendants
4 were served with process on or about April 5, 2007. Defendant Alta Bates Summit
5 Medical Center served a notice of deposition upon Plaintiff on April 12, 2007. See
6 McClain Decl. at ¶ 2. On April 20, 2007, Ms. McClain spoke by telephone with Scott
7 Emblidge, Plaintiff's counsel. During their discussion, which centered upon Defendants'
8 request to take Plaintiff's deposition before filing a responsive pleading, Ms. McClain
9 conveyed to Mr. Emblidge that Defendants intended to file a motion addressing the
10 constitutionally-protected nature of peer review. Mr. Emblidge responded by indicating
11 an understanding of the type of motion at issue. Thus, Plaintiff's counsel has had notice
12 since April 20, 2007 (**at least 76 days prior to the hearing date**) of Defendants' intent
13 to file the motion that was filed on May 30, 2007. *Id.* at ¶ 3.

14 After learning about the anti-SLAPP motion, Plaintiff re-filed the same
15 lawsuit in federal court on May 9, 2007. On May 10, 2007, Plaintiff dismissed his state
16 court action. Since the date of the filing of the federal court case, Defendants have
17 taken steps to expedite hearing of their Special Motion to Strike because of their
18 contention, expressed more fully in the motion, that this lawsuit is an impermissible
19 interference with the important public function of medical staff peer review. Such steps
20 include: (a) Defendants appeared in the federal court action, without the necessity of re-
21 service of the complaint, on May 22, 2007; (b) Defendants filed a Confidentiality
22 Stipulation and [Proposed] Protective Order, to facilitate the filing of motions predicated
23 upon confidential peer review activity, on May 23, 2007; (c) Defendants filed their
24 Special Motion to Strike, together with their Motion to Dismiss on May 30, 2007, within
25 the 60 day period from service of the State Court action; and (d) Defendants noticed
26 their motions for the first available hearing date in order to comply, insofar as possible
27 given the federal court's requirements for noticing motions, with the requirement of CCP
28 § 425.16 (f). *Id.* at ¶ 5.

As Ms. McClain has explained in her various communications with Mr. Emblidge concerning the issue of the hearing dates for the motions, while Defendants wish to extend professional courtesies to opposing counsel whenever possible, § 425.16, both in express language and in statutory purpose, demands expediency. Defendants, as explained above, are concerned both with meeting the statutory requirements of CCP § 425.16 and also with availing themselves of the protections afforded by the statute; that is, a prompt hearing on the anti-SLAPP motion. *Id.* at ¶ 6.

D. If The Court Is Inclined To Grant A Delay, Defendants Ask That The Hearing Date Be Set For August 2, 2007.

If the Court finds that some delay is warranted, Defendants ask that the hearing be rescheduled for August 2, 2007.² In addition, so as to not cause Defendants to incur attorneys' fees unnecessarily, Defendants ask that the Initial Case Management Conference and corresponding deadlines be continued to August 30, 2007. Finally, it should be noted that, despite the ongoing harms discussed above, Defendants did attempt to compromise with opposing counsel by offering, subject to the conditions specified in the correspondence, the August 2, 2007 hearing date, which is the same date the Court has scheduled the Initial Case Management Conference. It is unclear how Plaintiff intended to appear at the conference, yet cannot also appear at the hearings.

III. CONCLUSION

Defendants respectfully request that Dr. Ennix's request for a continuance of the July 5, 2007 hearing date be denied.

DATED: June 6, 2007

Respectfully submitted,

KAUFF McCLAIN & McGUIRE LLP

By: / S /
ALEX HERNAEZ

Attorneys for Defendants

² Defendants have submitted a [Proposed] Order denying this motion as well as an [Alternative Proposed] Order setting the hearing for August 2, 2007.